A

MAIMUNAH DERAMAN

v.

MAJLIS PERBANDARAN KEMAMAN

B

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24NCC-61-2010]
30 JULY 2010

C

ARBITRATION: *Award - Setting aside - Application for - Reference on question of law - Arbitration Act 2005, s. 42 - Claim for unpaid professional fees - Whether arbitrator failed to construe provisions in agreement - Whether arbitrator failed to apply relevant provisions of Architects (Scale of Minimum Fees) Rules 1986 & Architects Rules 1996*

D

- Error of law on the face of the award - Whether court can exercise supervisory jurisdiction - Whether court could interfere with findings of arbitrator - Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd

ARBITRATION: *Award - Challenge against - Reference on question of law - Arbitration Act 2005, s. 42 - Claim for unpaid professional fees- Whether arbitrator failed to construe provisions in agreement - Whether arbitrator failed to apply relevant provisions of Architects (Scale of Minimum Fees) Rules 1986 & Architects Rules 1996 - Error of law on the face of the award - Whether court can exercise supervisory jurisdiction - Whether court interfered with findings of arbitrator - Whether award set aside - Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd*

E

F

The plaintiff was appointed as a consultant architect by the defendant in relation to the construction of a floating restaurant and activity centre for the defendant. By the Memorandum of Agreement for Architectural Services ('the Agreement'), the plaintiff was to provide professional services in the form of, *inter alia*, schematic design, design development and supervision. It was agreed that the defendant would bill for professional services based on a scale stipulated in the Agreement. According to the plaintiff, she had commenced work and had completed the works up to the schematic design and design development phases wherein the sketches and architectural drawings were handed over to the defendant. *Vide* letter dated 10 December 2006, the defendant terminated the services of the plaintiff, whereupon the plaintiff tendered the statement of account and bills to the defendant with supporting documents in which the plaintiff claimed

G

H

I

the sum of RM311,850 for outstanding professional fees. The defendant made an offer of RM41,250 which was rejected by the plaintiff. The dispute was then referred to arbitration wherein the award was not in the plaintiff's favour. The learned arbitrator decided that no payment was due for the basic services rendered until and unless the defendant had agreed and accepted the schematic design proposal. The plaintiff challenged the said award by referring questions of law to this court as provided under s. 42(1) of the Arbitration Act 2005 ('the Act') wherein she contended, *inter alia*, that the arbitrator had failed to construe the relevant clauses in the Agreement and provisions under the Architects (Scale of Minimum Fees) Rules 1986 ('the Rules') and the Architects Rules 1996.

Held (allowing the plaintiff's application; setting aside arbitration award):

(1) The plaintiff had complied with the basic requirements under s. 42 of the Act. The questions of law to be determined were clearly identified and formulated, and the grounds on which the reference was sought were adequately stated. (*Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd;* refd). (para 21)

(2) The law supported a limited jurisdiction on the part of the High Court to intervene, but lack of appraisal of the law and the evidence was not *per se* a good ground to set aside or remit for reconsideration by the arbitral tribunal. There had to be a "serious failure" to analyse and appraise "material" and "relevant" evidence. (para 24)

(3) Although findings of facts on the evidence are in the main unassailable, there could be situations where questions of law can arise from these findings of facts, and if there be an error of law on the face of the award, the court can exercise its supervisory jurisdiction. The learned arbitrator had failed to address the applicable legal provisions in his award despite these provisions being argued before him during the arbitral proceedings. He had simply misconstrued the law and hence committed a fundamental error of law which was material to the decision that he made. Besides, he had simply omitted to address the relevant legal provisions. (para 27)

(4) Where the arbitrator had not addressed the relevant provisions in the award, despite the provisions been submitted before him, the award becomes open to correction as an arbitral error. Clause 3(a)(v) under the Agreement and r. 5(1)(v) of the Rules had no requirement for the acceptance of an agreement to the schematic design proposal. The arbitrator had failed to construe the relevant clauses of the contract in its entirety and failed to apply the statutory r. 5(1)(v) of the Rules and thereby had wrongfully deprived the plaintiff of her fees. The law did not require acceptance and agreement of the client to the schematic design proposal. Once the working drawings were completed, payment did not depend on these additional requirements which were nowhere mentioned in the contractual clauses and the statutory rules. (para 28)

Case(s) referred to:

GKN v. Matro [1976] Lloyd's Law Reports 555 ***(refd)***

Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC ***(refd)***

Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd [2009] 1 LNS 1766 HC ***(foll)***

Sami Mousawi Utama Sdn Bhd v. Kerajaan Negeri Sarawak [2004] 2 CLJ 186 CA ***(refd)***

Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1969] 1 LNS 172 HC ***(refd)***

Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 42(1), (2), (4)

Architects (Scale of Minimum Fees) Rules 1986, r. 5(1)(v)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, p 334

Sundra Rajoo & WSW Davidson, *The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia,* para 42.14, p 210

For the plaintiff - Ernest; M/s Ernest Azad & Assoc

For the defendant - Azwan Abdul Wahab; M/s Dzahara & Assocs

Reported by Kumitha Abdul Majid

JUDGMENT

Mohamad Ariff Yusof J:

[1] This was a relatively short application by originating summons by an architect claiming for unpaid professional fees who had an arbitration award dismissing her claim for her total professional fees, amounting to RM311,850, damages for wrongful/premature termination, interest and costs. In a brief final award, the learned arbitrator found that her claims failed completely. See para 4.0 of the final award:

> I NOW having considered the evidence and the submissions of Counsel and for the reasons set out hereafter FIND AND AWARD THAT THE CLAIMANT'S CLAIM FAIL COMPLETELY

[2] The material facts can be stated very briefly. The plaintiff was appointed as a consultant architect by the defendant, Majlis Perbandaran Kemaman, in relation to the construction of a floating restaurant and activity centre for the defendant. By the Memorandum of Agreement for Architectural Services executed between the parties, the plaintiff was to provide professional services in the form of schematic design, design development, contract documentation, and contract administration and supervision, in phases. It was agreed that the defendant would bill for professional services based on a scale stipulated in the Memorandum of Agreement. See cl. 11 of the Memorandum of Agreement and the Schedule of Fees appended thereto. The plaintiff's professional fees, as stated in the letter of appointment, was 11% of total construction costs on the basis of an estimated total project cost of RM6,000,000.

[3] The agreement provided that either party could terminate the agreement by giving a 30 days' notice. On the facts, the plaintiff had commenced work and, according to her, had completed the works up to the schematic design and design development phases. According to the plaintiff, the sketches and architectural drawings were handed over to the respondent.

[4] In a letter dated 10 December 2006, the defendant terminated the services of the plaintiff, whereupon the plaintiff tendered the statement of account and bills to the defendant with supporting documents, in which she claimed the sum of RM311,850 inclusive of service tax of 5% for outstanding professional fees.

[5] The defendant made an offer of RM41,250, which was rejected by the plaintiff.

[6] The dispute was then referred to arbitration, and as has been noted earlier, the award was not in her favour.

[7] According to the plaintiff, she had completed the professional services for first two phases, namely the schematic design phase and the design development case. When the services were terminated she had put in a claim for her professional fees based on the agreed scale fees. She had relied on cl. 3(a), 3(b) and 11 of the Schedule of Fees in the Memorandum of Agreement. It was also argued that these provisions in the Memorandum of Agreement, in essence, mirrored the rules in the Architects (Scale of Minimum Fees) Rules 1986 and the Architects Rules 1996.

[8] Clause 3 of the Schedule, headed "Basic Services", read as follows:

> 3. Basic Services
>
> The basic services to be rendered by the consulting architect shall be as follows:
>
> (a) schematic design stage
>
> This phase comprises the following:
>
> (i) Taking instructions from the Government to ascertain the requirements and constraints of the works;
>
> (ii) Preparing preliminary sketch designs to interpret the design brief;
>
> (iii) Developing the sketch designs to a state sufficient to enable applications to be made for planning approval or approval in principle in connection with any specific bylaw;
>
> (iv) Preparing preliminary estimates of the probable construction cost based on current area, volume and other unit costs; and
>
> (v) Where applicable, submitting the drawings to the relevant approving authorities for either town planning approval or approval in principle.
>
> (b) Design Development Phase
>
> This phase comprises the following:

(i) Upon the approval of the proposals by the relevant approving authority or the Government, developing schematic design drawings to a stage to enable other independent consultants to commence detailed design work;

(ii) Preparing working drawings and submitting the same together with necessary particulars to the relevant approving authority to obtain the statutory building approval;

(iii) Updating of preliminary estimates of construction costs; and

(iv) Preparing a probable construction schedule and submitting the same to the Government for its approval.

[9] Under cl. 11, headed "Mode in Time of Payment for Basic Services", it is provided that the consulting architect shall be paid for the basic services rendered "monthly in proportion to the services rendered so that the fees paid and the completion of each of the following phases shall be equal to the percentages as follows ..." The percentages are:

Schematic design phase	15%
Design development phase	30%
Contract documentation phase	25%
Contract administration and supervision phase	30%

[10] In accordance with these scale fees, the plaintiff made the claim for RM311,850 inclusive of service tax of 5% for outstanding professional fees. This is calculated on the basis of 15% of the 11% and 30% of the 11% of the total construction costs.

The Final Award

[11] The relevant parts of the final award read:

5.03 Schematic Design Stage and Design Development Phase Not Completed

a. The Claimant's Bill number P007 is on the basis of fees due on completion of the schematic designs stage and design development phase of section 3, basic services of Schedule Fees in the MOA.

A b. The Claimant had not provided the services under the MOA to a stage sufficient for her to claim completion of both the schematic design stage (schematic design phase as referred to in the Claimant's Bill number P007) and the design development phase and consequently the fees allocated in the MOA for the schematic design phase and design development B phase are not due to her as billed and claimed.

c. The Claimant had not, even at the time of the Respondent's letter dated 10th to December 2nd 2006 terminating services because of Respondents dissatisfaction with the services, obtained the Respondent's acceptance of and agreement to C any of the Claimant's schematic design proposals that had been presented at the full MPK Council meeting on 28th June 2006 or subsequently and the two (2) technical meetings held on 28th September and 31st of October 2006.

D ...

f. The finding therefore has to be that without the Respondent's acceptance of and agreement to schematic design proposal the Claimant services under the schematic design phase are incomplete.

E ...

h. The 15% fee allocated for the schematic design phase does not become due and payable by the mere obtaining of the clients acceptance of/agreement to the schematic design F concept or proposal.

...

i. In architectural practice, the percentage fee for the schematic design phase is generally accepted as due and payable after G the schematic design that is agreed to by the client had been developed to a stage to enable an application to be made for planning approval and for approval in principle from authorities with jurisdiction over the proposed development as the case may be.

H **[12]** The short point that can be taken here is, according to the learned arbitrator, no payment was due for the basic services rendered until and unless the client (the defendant) had agreed and accepted the schematic design proposal.

I **[13]** Counsel for the defendant supported these findings and made it a point to stress the correctness of the findings. The issue was whether the consultant architect had completed the services to the satisfaction of the client.

[14] The plaintiff then filed this suit under s. 42(1) of the Arbitration Act 2005.

[15] This application by originating summons stated:

> By this summons, the Plaintiff seeks the determination of the court on the following questions of law arising out of an award published by the Arbitrator, Ar. Ng Chee Keong, on 18th January 2010 which are as follows:
>
> 1. Whether the Arbitrator in an award, in respect of a reference to him of an architect's entitlement of professional fees, ought to specifically construe and give effect to relevant provisions of the Memorandum of Agreement between the architect and the employer, and to the provisions of the Architects (Scale of Minimum Fees) Rules 1986 and the Architects Rules 1996, under the Architects Act 1967, in particular:
>
> (i) The construction and effect of Rule 5 and Rule 10 of the Second Schedule of the Architects (Scale of Minimum Fees) Rules 1986 to the matters in reference;
>
> (ii) That the construction and effect of Rules 11, 14 and 17 of Architect Rules 1996, Third Schedule Part 1 to the matter in reference; and
>
> (iii) Whether failure of the Arbitrator to construe and give effect to the provisions of the Memorandum of Agreement and the said Architects (Minimum Fees Rules) 1986 and the Architects Rules 1996 in his award gives rise to questions of law for reference to this court.

[16] The reliefs prayed for included:

(a) The arbitration award be varied;

(b) Alternatively, the arbitration award be set aside;

(c) Costs to be paid by the Defendant;

(d) Any other order relief deemed just and fair by this honourable court.

The Plaintiff's Arguments

[17] This was how the plaintiff's case was presented:

The Plaintiff challenges the award by referring questions of law to the High Court as provided under Section 42(1) of the Arbitration Act 2005 which, *inter alia* are:

a) The Arbitrator failed to refer and construe in particular, Clause 3(a), 3(b) and Clause 11 of the Agreement ... These Clauses are concerned with the issue of the Architect's Professional Fees. The Arbitrator erred in law when he failed to construe these clauses which resulted in an award that gives rise to questions of law.

b) The Arbitrator in failing to construe the above Clauses had also failed to apply the relevant provision of the Architects (Scale of Minimum Fees) Rules 1986 and the Architects Rules 1996 under the Architects Act 1967.

The Arbitrator in the award stated "the findings therefore has to be that without Respondent's acceptance of and Agreement to schematic design proposal, the Claimant services under the schematic design phase are incomplete ..."

The Plaintiff refers to Clause 3(a) of the schematic design stage of the Agreement ... which states the basic services of the consulting architect shall be as follows: at 3(a)(v) it states "where applicable, submitting the drawings to the relevant approving authorities for either town planning approval or approval in principle". Under this Clause, the architect is required to submit the drawings. Clearly, the Arbitrator's findings without reference to the Agreement is an error of law.

Further, under the Architects (Scale of Minimum Fees) Rules 1986, Rule 5(1)(v) schematic design phase, the wordings are the same as Clause 3(a) subclause 5 referred to above.

Both Clause 3(a)(v) under the Agreement and the statutory Rule 5(1)(v) have no requirement "for the acceptance of an Agreement to the schematic design proposal ...". This is clearly a question of law arising out of an award. The Arbitrator in failing to construe the relevant Clause of the contract, in failing to apply the statutory Rule 5(1)(v) which covers the work for the schematic design phase had wrongfully deprived the Plaintiff of the fees for this phase of work.

The law does not require "acceptance" and "agreement" to the schematic design proposal. In any event, Clause 10(3) of the Agreement ..., the wording of which are similar to rule 14 of the Architects Rules 1996, and Third Schedule, Part 1 states the Defendant (the client) shall give a decision within a reasonable

time on matters submitted by the professional architect so as not to delay professional architect's work.

The evidence and the hearing showed that the Defendant had delayed in giving instructions to the Plaintiff, unreasonably.

The Claimant's claim for fees for the schematic design phase is as per Clause 11(1) ...

[18] It was stressed by the plaintiff the working drawings were submitted to the defendant.

Requirements Under s. 42

[19] Section 42 of the Arbitration Act is headed "Reference on Questions of Law". Under subsection (1) of the section, any party "may refer" to the High Court any "question of law arising out of an award." This reference must be filed within 42 days of the publication and receipt of the award, and must identify the question of law to be determined and additionally identify the grounds on which the reference is sought. (Subsection (2)). Under subsection (4), the High Court may, on the determination of the reference, order the following:

(a) confirm the award;

(b) vary the award:

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the Arbitral Tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

[20] Malaysian law refers to a "reference" as opposed to an "appeal" but the question of law referred is nevertheless required to be a question which "arises out of an award."

[21] I found that the basic requirements under s. 42 had been complied with by the plaintiff. The questions of law to be determined were clearly identified and formulated, and the grounds on which the reference was sought were adequately stated. See the commentary in Sundra Rajoo & WSW Davidson, *The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia,* at para 42.14, p. 210. See also *Taman Bandar Baru Masai Sdn*

Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 and the observations by Dr. Hamid Sultan Abu Backer J at p. 101 of the report:

> When the relief under section 42 is sought, there is a duty and obligation to state the question of law arising from the award in a concise manner, and state the grounds on which the reference is sought; in addition, I will say, must state the facts leading to the grounds, failing which the relief will not be granted.

Test To Apply Under s. 42

[22] At the outset of the submissions, I indicated to counsel that I had held in Suit No: R3(2)-24-64-2008 *Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd* [2009] 1 LNS 1766 a concluded view that the principles applicable to "error of law on the face of the award" should continue to apply in the context of s. 42. Both counsel agreed that these principles should be taken as applicable.

[23] For consistency and completeness, I restate some pertinent parts of that judgment below:

> In my view, the emphasis on the words "arising out of an award" is pertinent one. A question of law must arise out of an award, and not out of the arbitration. As such, the jurisdiction conferred on the court should be limited one, more in line with the jurisprudence on error of law on the face of the award. This is a view urged upon this court by Defendant's counsel, who, through his industry, has systematically analysed the development of the law in Malaysia in that regard. To summarise the position taken by the Defendant, counsel argues the common law remedy of "error of law on the face of the award" is "entrenched" in the Malaysian legal jurisprudence, and it is a well-established principle of construction that the statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that unmistakably point to the conclusion. Counsel impressed upon me how the common law has incorporated this jurisprudence since 1841 (following the decision in *re Hall and Hinds*) through other leading decisions in 1843, 1845, 1846 1849, 1857 (citing the cases of *Phillips v. Evans, Hagger v. Baker, Fuller v. Fenwick, Hutchinson v. Shepperton and others, Hutchinson v. Fernie*) until the present with the passing of the English Arbitration Act 1996. Turning to the development in Malaysia, counsel cited the early case of *Government of Kelantan v. Duff Development Company Limited* [1932] AC 395 (Privy Council) which expressly

incorporated the law on "error of law on the face of the award", down to the celebrated decision in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210, to the relatively more recent decisions which include the following:

(a) *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788;

(b) *Shanmugan Paramsothy v. Thiagarajah Pooinpatarsan & Ors* [2001] 8 CLJ 683;

(c) *Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd* [2003] 1 CLJ 103;

(d) *Pembinaan LCL Sdn Bhd v. SKS Styrofoam (M) Sdn Bhd* [2007] 3 CLJ 185.

(e) *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791.

The observations of the High Court in *Shanmugam Paramsothy* was also emphasised in support of the position taken by counsel for the Defendant. The High Court in the case said:

> As I see it, the availability of the common law remedy (in reference to error of law on the face of the award) is so deeply entrenched in our law and the decisions of the appellate courts binding on the High Court that short of a provision similar to section 1(1) of the 1979 Act which provides that the High Court shall not have the jurisdiction to set aside a remit an award in the Arbitrator's Agreement on the ground of errors of fact or law on the face of the award, the courts here have the jurisdiction to set aside an award on the ground of error of law on the face of the award. (At page 310 of the report).

> ... I share the view the jurisprudence on "error of law on the face of the award" is very well entrenched in Malaysian law such that any attempt to have it displaced must accordingly find strong statutory support and rationale. As indicated earlier in this judgment, the Malaysian statutory provision, unlike the UK provision, does not expressly exclude the application of "error of law on the face of the award." ... It will be therefore consistent with principle and authority, and consistent as well with established principles of statutory interpretation, for this court to agree with the view taken by the Defendant. In my view, the emphasis on

A the words "arising out of an award" is pertinent one. A question of law must arise out of an award, and not out of the arbitration. As such, the jurisdiction conferred on the court should be limited one, more in line with the jurisprudence on error of law on the face of the award.

B ... It will be therefore consistent with principle and authority, and consistent as well with established principles of statutory interpretation, for this court to agree with the view taken by the Defendant. ... Briefly put, the established law and current statutory provision cannot simply allow the C Court to reverse the entire jurisprudence on "error of law on the face of the award".

Application Of The Error Of Law Principles

[24] On the agreed basis that the principles on "error of law on D the face of the award" should continue to apply under s. 42, the main issue then revolved around the question whether the challenge was mounted on findings of fact on the evidence, or a question of law which was in error in the accepted sense that "the arbitrator has proceeded illegally, as, for instance, by deciding E on evidence which was not admissible, or on principles of construction which the law does not countenance" (*Halsbury's Laws of England*, 4th edn, p. 334). The resolution of this action had also to proceed on the basis that the law supported a limited jurisdiction on the part of the High Court to intervene, but lack F of appraisal of the law and the evidence was not *per se* a good ground to set aside or remit for reconsideration by the arbitral tribunal. There had to be a "serious failure" to analyse and appraise "material" and "relevant" evidence: *Sami Mousawi Utama Sdn Bhd v. Kerajaan Negeri Sarawak* [2004] 2 CLJ 186 (Court of G Appeal). See also *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1969] 1 LNS 172 and *GKN v. Matro* [1976] Lloyd's Law Reports 555, vol. 2: "The weight of evidence and inferences from it are essentially matters for the arbitrator." Further, I was obviously mindful of the first principles H that this limited jurisdiction should be exercised only in "exceptional circumstances" and should be confined to arbitral errors and not appellate errors, in the sense that the court should not concern itself with the mere merits or correctness of the arbitrator's decision.

I

[25] In *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743 Siti Norma FCJ stated these governing principles thus:

> The law regarding the effect of an arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an Arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient for the setting aside of his award. "It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood" per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Perumahan v. Federal Land Development Authority* [1969] 1 LNS 172; [1971] 2 MLJ 210. (at page 407)"

[26] Having considered the facts and grounds in support of this application, and the opposing submissions of the parties, I was of the view that this was a proper case to allow the application and set aside the award on the ground of error of law on the face of the award, or an error of law arising out of the award within the meaning of s. 42 of the Act.

Questions Of Law Arising From Findings Of Facts

[27] Although findings of facts on the evidence are in the main unassailable, there could be situations where questions of law can arise from these findings of facts, and if there be an error of law on the face of the award, the court can exercise its supervisory jurisdiction. I found the facts of this present application fitted within this situation. The learned arbitrator had failed to address the applicable legal provisions in his award despite these provisions being argued before him during the arbitral proceedings. He had simply, with respect, misconstrued the law and in so doing committed a fundamental error of law material to the decision that he made. This was not a case of the arbitrator making a wrong interpretation of legal provisions; he had simply omitted to address the relevant legal provisions. The general fact-pattern here therefore has some similarity with that in *Intelek Timur, supra*, where the Federal Court held:

> In dealing with this particular clause in the award, the Arbitrator was more concerned with the issue as to whether the Respondent had complied with the procedure of serving the notice of determination as laid down in the contract. He did not direct his mind to the proviso as to whether the notice had been issued unreasonably or vexatiously. He had not subjected himself to the crucial question as to the Respondents conduct in sending the notice and in so doing had, on principles of construction, erroneously construed the provisions of Clause 26(1)(a). It is in this respect that the Court of Appeal fell into error in assuming that the Arbitrator had considered the whole clause in its entirety. *I say that this failure to analyse and appraise the effect of Clause 26(1)(a) in its entirety, as is apparent on the face of the record, is one instance of conduct which the law does not countenance* and it is this error of law that empowers me to have the award set aside ... (at page 489 of the report). (emphasis added)

[28] A failure to consider relevant governing principles of law will therefore be an instance of an arbitrator applying principles of construction which the law does not countenance, which is an established instance of an error of law on the face of the award. Much as this court should not willy-nilly interfere with the findings of an arbitrator, where the arbitrator has not addressed the relevant provisions in the award, despite the provisions been submitted before him, the award becomes open to correction as an arbitral error. I was of the opinion that this was the case on the facts of this suit. I was in agreement with the plaintiff's position that cl. 3(a)(v) under the agreement and r. 5(1)(v) had no requirement "for the acceptance of an agreement to the schematic design proposal. The arbitrator had failed to construe the relevant clauses of the contract in its entirety and failed to apply the statutory r. 5(1)(v) and thereby had wrongfully deprived the plaintiff of her fees. The law did not require "acceptance" and "agreement" of the client to the schematic design proposal. Once the working drawings were completed, payment did not depend on these additional requirements which were nowhere mentioned in the contractual clauses and the statutory rules.

Conclusion

[29] In the circumstances, I allowed the plaintiff's application as prayed in prayer (2)(b), namely that the award be set aside. I also ordered costs of RM5,000 to be paid by the defendant to the plaintiff.

[30] Prayer (2)(b) was an alternative prayer. I did not however think it would be right to accede to prayer (2)(a) which was for the final award to be varied. To do so would have been to completely supplant the award under the guise of variation. It would be more in consonance with this court's function to instead allow the parties to perhaps restart the arbitral process afresh before a different arbitrator, bearing in mind the findings of this court on the questions of law arising out of the present award presented before it.

A

B

C

D

E

F

G

H

I